111

(4)

Supreme Court, U.S.
FILED
NOV 19 2008
OFFICE OF THE CLERK

No. 08-212

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT PETRO STAR INC.

RICHARD A. CURTIN
General Counsel
PETRO STAR INC.
3900 C Street, Suite 401
Anchorage, AK 99503
(907) 339-6660

DANIEL P. COLLINS
Counsel of Record
JONATHAN BLAVIN
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Los Angeles, CA 90071
(213) 683-9100

Counsel for Respondent Petro Star Inc.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the Constitution forbids Congress from enacting a statute that imposes an explicit temporal limit on an administrative agency's yet-to-be-exercised equitable discretion to impose retroactive rates in a pending administrative ratesetting proceeding involving the Trans Alaska Pipeline System.

RULE 29.6 STATEMENT

Respondent Petro Star Inc. is a wholly owned subsidiary of Arctic Slope Regional Corporation. No publicly held company owns 10% or more of either corporation's stock.

TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT 2

REASONS FOR DENYING THE PETITION 10

I. Petitioner's Novel Claim That Congress May Not Act to Narrow an Agency's Equitable Discretion in a Non-Final Administrative Ratemaking Proceeding Does Not Warrant Review 12

A. The Particular Question on Which Certiorari Is Sought Is Not Presented by the Facts of This Case 12

B. There Is No Conflict With *Klein* or Any Decision of This Court 17

C. There Is No Conflict Among the Lower Courts 22

II. Petitioner's Rational-Basis Challenge to the Statute Presents No Split of Authority and Is Insubstantial 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

City of New York v. Beretta U.S.A. Corp.,
524 F.3d 384 (2d Cir. 2008) 23

Colorado Interstate Gas Co. v. Federal Power Comm'n,
324 U.S. 581 (1945) 21

Crater v. Galaza,
491 F.3d 1119 (9th Cir. 2007) 23

Davis v. Straub,
445 F.3d 908 (6th Cir. 2006) 24

District of Columbia v. Beretta U.S.A. Corp.,
940 A.2d 163 (D.C. 2008) 24

Evans v. Thompson,
518 F.3d 1 (1st Cir. 2008) 23

Exxon Co., USA v. FERC,
182 F.3d 30 (D.C. Cir 1999) 4, 5, 15, 21

FCC v. Beach Communications, Inc.,
508 U.S. 307 (1993) 27

Glidden Co. v. Zdanok,
370 U.S. 530 (1962) 1, 20

Green v. French,
143 F.3d 865 (4th Cir. 1998) 23

Gutierrez de Martinez v. Lamagno,
515 U.S. 417 (1995) 23

Johnson v. Arizona,
462 F.2d 1352 (9th Cir. 1972) 28

CASES—Continued

Lindh v. Murphy,
96 F.3d 856 (7th Cir. 1996),
rev'd, 521 U.S. 320 (1997) 22

Marshall Field & Co. v. Clark,
143 U.S. 649 (1892) 9

National Coalition to Save Our Mall v. Norton,
269 F.3d 1092 (D.C. Cir. 2001) 24, 25, 26

New Orleans Pub. Serv., Inc. v. Council of City of New Orleans,
491 U.S. 350 (1989) 16, 21

OXY, U.S.A. v. FERC,
64 F.3d 679 (D.C. Cir. 1995) 4, 6

Paramino Co. v. Marshall,
309 U.S. 370 (1940) 1, 20

Pension Benefit Guar. Corp. v. R.A. Gray & Co.,
467 U.S. 717 (1984) 27

Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995) 1, 20, 28

Robertson v. Seattle Audobon Soc'y,
503 U.S. 429 (1992) 11, 15, 16, 25

Schiavo ex rel. Schindler v. Schiavo,
404 F.3d 1270 (11th Cir. 2005) 24

Shawnee Tribe v. United States,
423 F.3d 1204 (10th Cir. 2005) 23

Tesoro Alaska Petroleum Co. v. FERC,
234 F. 3d 1286 (D.C. Cir. 2000) 5

United States v. Klein,
80 U.S. (13 Wall.) 128 (1871) ..... *passim*

CASES—Continued

United States v. Padelford,
76 U.S. (9 Wall.) 531 (1870) 18

Williams v. United States,
289 U.S. 553 (1933) 19, 20

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Article III 19, 20, 23, 24

STATUTES AND RULES

5 U.S.C. § 557 ..... 8, 21

28 U.S.C. § 171 20

Pub. L. No. 109-59, § 4412,
119 Stat. 1144, 1778 (2005) ..... *passim*

Trans Alaska Pipeline Authorization Act,
43 U.S.C. § 1651, *et seq.* 2

18 C.F.R. § 385.708 8

LEGISLATIVE MATERIALS

H.R. Rep. No. 108-792 (2004) 8

S. Rep. 108-353 (2004) 8

151 Cong. Rec. S3752 (daily ed. Apr. 15, 2005) 28

ADMINISTRATIVE DECISIONS

Trans Alaska Pipeline System,
65 FERC ¶ 61,277 (1993) 6

Trans Alaska Pipeline System,
81 FERC ¶ 61,319 (1997) 6, 7

Trans Alaska Pipeline System,
108 FERC ¶ 63,030 (2004) 7

INTRODUCTION

Petitioner seeks review of the D.C. Circuit's unpublished decision rejecting all challenges to a Federal Energy Regulatory Commission (FERC) order that terminated a nearly 20-year-long ratemaking proceeding concerning oil transported in the Trans Alaska Pipeline System (TAPS). Specifically, Petitioner challenges the application of a new federal statute—enacted *before* FERC ruled in this case—that imposed a temporal limit on FERC's equitable discretion to give retroactive effect to certain rate changes affecting TAPS. Even though the statute affected only the future exercise of equitable discretion by an administrative agency, Petitioner ominously (and wrongly) contends that the statute usurps a "core *judicial* function" by "dictat[ing] the result[]" in a pending proceeding in violation of principles established in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). *See* Pet. 10-11 (emphasis added). For several reasons, the Petition presents no certworthy question, lacks merit, and should be denied.

The ruling below does not conflict with any decision of this Court or of any other court of appeals. Petitioner has failed to identify any federal appellate decision that has ever extended *Klein* to the administrative context, much less to an administrative ratemaking proceeding. On the contrary, this Court has consistently emphasized that Congress's power to affect "administrative orders" is significantly greater than its power to "affect[] judicial judgments." *Paramino Co. v. Marshall*, 309 U.S. 370, 381 n.25 (1940); *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 232 (1995) (constitutional limits on legislative reopening of federal court judgments did not apply to "administrative agencies"); *Glidden Co. v. Zdanok*, 370 U.S. 530, 568 (1962) (plurality) (*Klein* only applies to entities "invested with *judicial* power") (emphasis added). *See post*, pp. 17-21.

Moreover, the record in this case does not even raise the specific question presented, because the statute at issue did not "dictat[e]" any particular result. During the FERC proceedings, the parties raised a variety of contested points concerning whether retroactivity should be ordered and, if so, for what specific time frames. The statute did *not* attempt to resolve all of these issues, so as to specify a particular outcome. Instead, the statute preserved FERC's equitable discretion on these questions, subject only to the statute's imposition of an explicit cap on the *maximum* length of any period of retroactivity. *Post*, pp. 12-16. In addition, Petitioner's theory that the statute improperly singles out this ratemaking proceeding for differential treatment rests on a clear misinterpretation of the underlying statute: indeed, Congress arguably was *more* permissive in allowing retroactivity in this pending case than the statute allows in future cases. *Post*, pp. 28-30.

Collectively, these features make this case a particularly unsuitable vehicle for exploring Petitioner's novel and splitless issue concerning the reach of *Klein* in administrative ratemaking proceedings. The Petition should be denied.

STATEMENT

1. Congress passed the Trans Alaska Pipeline Authorization Act, 43 U.S.C. § 1651, *et seq.*, in order to facilitate the building of TAPS after major crude oil reserves were discovered on Alaska's North Slope. TAPS operates as a commingled pipeline. As a result, the value of the oil that a company places *into* TAPS may be different from the value of the homogenous oil that is delivered to all companies *from* TAPS

at its Valdez terminus. TAPS receives oil both from the North Slope fields and from commercial refineries along the pipeline (including those belonging to Respondent Petro Star) that receive their oil supplies from TAPS, distill the oil, retain some fractions to use as fuel or to manufacture products for sale, and return the remainder to TAPS.

The TAPS carriers who manage the pipeline established the "TAPS Quality Bank" system to adjust for these differences in value. At each point along the pipeline where oil is added to the common stream, the Quality Bank compares the relative value of that oil to the value of the common stream. Each shipper is then paid—or pays—the difference in value between the oil that it tendered into TAPS and the oil that it received from TAPS.

2. The current proceedings have a long and complex history extending back to 1989. In 1993, FERC approved, with modifications, a settlement implementing a new Quality Bank methodology. Under this so-called "distillation" or "assay" methodology, the relative value of each barrel of oil is determined by splitting the oil into its components, or "cuts," assigning a value to each cut, and then calculating the value of the whole barrel as the weighted average value of the different cuts. Where available, market prices were to be used as reference prices for the different cuts. However, appropriate reference prices were not available for all of the cuts. Accordingly, the settlement established a methodology for valuing the so-called "Resid" cut (which consists of the densest material in crude oil). After FERC approved this methodology with modifications, Exxon and several other parties petitioned for review of the order. The

D.C. Circuit granted the petition in part, rejected FERC's Resid valuation, and remanded the matter for further proceedings. *See OXY, U.S.A. v. FERC,* 64 F.3d 679, 694 (D.C. Cir. 1995).

3. Following the *OXY* remand, all of the parties to the proceeding except Exxon and Tesoro (Tesoro being the remaining Alaska refiner, and a competitor of the other refiners who are dependent on TAPS) reached a new settlement.[1] Among other things, this settlement provided a new methodology for valuing Resid and advanced a new rationale for this valuation. The settlement also provided that its new methodology would be prospective only, from the date that the settlement was approved by FERC.

Exxon contested the settlement, but after resolving the disputed issues on the merits, FERC approved it. Exxon again petitioned for review. The D.C. Circuit accepted in part and rejected in part the settlement's method for valuing Resid. *Exxon Co., USA v. FERC,* 182 F.3d 30 (D.C. Cir 1999). As to the retroactivity issue, the court "agree[d] that FERC does have a measure of discretion in determining when and if a rate should apply retroactively." *Id.* at 49. Ordinarily, "'the proper remedy is one that puts the parties in the position they would have been in had the error not been made,'" but the court acknowledged that there may be "other considerations properly within [FERC's] ambit [that] counsel otherwise" in any given case. *Id.* (citation omitted). The court held, however, that FERC had abused its discretion by failing

---

[1] The parties that joined the settlement were ARCO Alaska, Inc.; BP Exploration (Alaska), Inc.; MAPCO Alaska Petroleum, Inc.; OXY USA, Inc.; Petro Star; Phillips Petroleum Company; Union Oil Company of California; and the State of Alaska.

adequately to explain why it did not make the changes retroactive to 1993. *Id.* at 49-50. The valuation of the Resid cut and the issue of retroactivity were remanded to FERC.

4. On remand, proceedings concerning these two issues were consolidated with proceedings addressing separate complaints that had been remanded by the subsequent decision in *Tesoro Alaska Petroleum Co. v. FERC*, 234 F. 3d 1286 (D.C. Cir. 2000), as well as with a new proceeding concerning another cut known as the "Heavy Distillate" cut. On the eve of the consolidated hearing before an Administrative Law Judge (ALJ), all parties entered into a stipulation that provided for a new Resid valuation methodology but that left open certain questions about what specific values the agreed-upon methodology should yield, as well as the question of whether to apply this valuation retroactively. The stipulation also established a reference price for Heavy Distillate and set a February 1, 2000 effective date for that new valuation (subject to certain adjustments that remained to be litigated).

Eight of the parties adopted a common position on all remaining issues except the valuation of another cut not at issue here.[2] They presented evidence establishing the equitable reasons why retroactive implementation of the new Resid valuation would not be appropriate. First, they explained how the Resid valuation was of crucial importance to the refiners. In particular, because the refiners retained little or

---

[2] These "Eight Parties" were Petro Star; BP America Production Company; BP Exploration (Alaska) Inc.; ConocoPhillips Alaska, Inc.; OXY USA Inc.; the State of Alaska; Union Oil Company of California; and Williams Alaska Petroleum Inc.

no Resid, their "return oil" had a relatively higher concentration of Resid than the TAPS common stream. As a result, the retroactive assignment of a low value for Resid would hit the refiners particularly hard, because it would substantially reduce—after the fact—the overall value of their more Resid-heavy return oil. Second, the "Eight Parties" presented evidence showing how Quality Bank considerations can drive refiner decisions, in real time, about whether or not to manufacture particular products for particular markets. If Quality Bank payments are high, a refiner can mitigate that effect on its costs and profits by producing fewer fuel products that incur those costs—which in turn would reduce the total Quality Bank payments owed. Because refiners typically cannot make retroactive adjustments to the prices they received for fuel sold long ago, any retroactive Quality Bank adjustments can transform a decision that was good when made into a money-loser. The upshot of this evidence was that the equitable goal of placing all of the parties in the positions they would have occupied had FERC not erred in its original Resid valuation was now unobtainable.

Moreover, when FERC ordered a new distillation methodology in 1993, the refineries had no way of predicting a future Resid valuation or that it would be imposed retroactively. As of 1993, Exxon advocated a valuation method for Resid that was materially different from the approach finally stipulated in 2002. *Trans Alaska Pipeline System*, 65 FERC ¶ 61,277, at 62,282-62,288 (Nov. 30, 1993). As late as 1997, when it approved the settlement that followed the *OXY* remand, FERC itself believed that prospective implementation of a new Resid valuation was appropriate. *Trans Alaska Pipeline System*, 81 FERC

¶ 61,319 at 62,467 (Dec. 17, 1997). Because Petitioner was unsuccessful in urging retroactive application of the Resid cut until the court of appeals' 1999 *Exxon* decision first ordered FERC to re-examine the question, it did not appear probable before then that any retroactivity would be ordered. Moreover, even then, there was no way to predict the extremely low valuation that the ALJ would ultimately place on Resid (a valuation lower than that advocated by any party at the hearing). This Resid valuation, combined with the possibility that it might be imposed over a very long retroactive period, threatened the viability at least of Petro Star, a small Alaska-Native-owned business refiner.

The ALJ issued a lengthy "Initial Decision" that, *inter alia*, addressed the Resid retroactivity issue. *Trans Alaska Pipeline System*, 108 FERC ¶ 63,030 at 65,612-65,661 (Aug. 31, 2004). He held that the Eight Parties had made "a strong case based on equitable considerations for holding that the values of the remand cuts should be made effective on a prospective basis only." Pet. App. 171a. Nevertheless, the ALJ concluded that, "since the adoption of the distillation method there never had been a just and reasonable Resid proxy until this proceeding, and the proxy which is determined herein for Resid is the only just and reasonable value for it since December 1, 1993, and it must be *made effective on that date notwithstanding any equitable consideration*." *Id.*

The Eight Parties filed timely exceptions to the Initial Decision, contending (*inter alia*) that the ALJ had erred in ordering retroactive application of the new Resid valuation. Pet. App. 174a-183a. Pursuant to FERC's rules, these filings prevented the Initial

Decision from becoming a final decision of the Commission, 18 C.F.R. § 385.708(d), and FERC thus commenced its own review with "all the powers which it would have in making the initial decision." 5 U.S.C. § 557(b).

5. As the protracted Quality Bank litigation continued, Congress became concerned about its consequences. Pet. 6-7. On July 28, 2004, a House Conference Report stated: "Considering the specific equities of this case, the general importance of continued domestic refinery activity in order to protect national fuel supplies and the need to limit business uncertainty associated with the use of the Trans Alaska Pipeline System, Congress expects the Federal Energy Regulatory Commission to evaluate carefully the disputed Resid valuation and related retroactive refund matter affecting the TAPS Quality Bank Adjustments." H.R. REP. NO. 108-792 at 1640 (2004). On September 21, 2004, a Senate Appropriation Committee report expressed a similar view. S. REP. 108-353 at 146 (2004). Both reports observed that "[Congress] is particularly concerned about the equity of assigning retroactive refunds beyond a term of 15 months." H.R. REP. NO. 108-792 at 1640; S. REP. 108-353 at 146. In April 2005, the Alaska congressional delegation restated the views expressed by the Committees in a letter to FERC that was placed in the public record of the proceedings before it. Fearful of a legislative intervention, Exxon convinced an Alaska Senator in May 2005 "to delay pressing for a Congressional solution to give settlement talks more time to proceed." Pet. App. 205a.[3]

---

[3] This successful exercise of Exxon's own First Amendment right to petition during Congress's evaluation of TAPS ratemaking

No settlement was reached, however, and while the proceedings still were pending before FERC, Congress enacted legislation aimed at the problems it had identified. *See* Pub. L. No. 109-59, § 4412, 119 Stat. 1144, 1778 (2005). Section 4412 requires FERC to conclude Quality Bank proceedings initiated after the statute's enactment within 15 months of their being filed, and prohibits FERC from ordering retroactive Quality Bank adjustments "for any period that exceeds the 15 month period immediately preceding the earliest date of the first order of the [FERC] imposing quality bank adjustments in the proceeding." *Id.*, § 4412(b)(2). For proceedings that were pending when section 4412 was enacted, however, Congress allowed more generous retroactivity, dating back to the fixed date of February 1, 2000. *Id.*, § 4412(b)(1).

6. On October 20, 2005, the Commission issued its Opinion No. 481 and Order on Initial Decision. Pet. App. 89a-201a. The Commission largely affirmed the Initial Decision, including its allowance of equitable refunds, but held that "as required by recent Congressional action," it would limit "any retroactive refunds resulting from the new valuations to February 1, 2000, rather than back to December 1, 1993." Pet App. 91a, 165a-166a.

Exxon again petitioned the D.C. Circuit for review. It contended that section 4412(b)(1) was unconstitutional because it applied only to the pending FERC proceeding resolved in Opinion No. 481 and thus de-

---

belies Exxon's unfounded innuendo that the ultimate legislation was a product of some sort of "shocking mischief." Pet. 2. Moreover, Exxon's complaint that the ultimate legislation was adopted without "hearings or floor debate," Pet. 7, is irrelevant. *Cf. Marshall Field & Co. v. Clark*, 143 U.S. 649, 672-73 (1892).

nied Exxon substantive due process and equal protection of the laws, and also interfered with a pending adjudication in violation of the separation of powers. The court of appeals rejected these contentions in a brief unpublished decision. Pet. App. 1a, 4a.

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to review the question whether Congress may usurp a "core judicial function" by "dictat[ing]" the outcome of a "pending adjudication" without amending the applicable law. Pet. 10, 14. The Petition can and should be denied for the simple reason that no such question is even presented by the D.C. Circuit's unpublished decision upholding the order issued by FERC in this case. The "adjudication" involved here was *not* a judicial proceeding, much less one involving the exercise of "core judicial function[s]"; rather, it was an *administrative* ratemaking proceeding involving the exercise of regulatory discretion. Moreover, by enacting temporal limits on the extent to which FERC could set rates retroactively for oil shipped in the TAPS, Congress did *not* "dictate" the outcome of the FERC proceeding; rather, it merely set an outer boundary on the agency's equitable discretion to impose retroactive rates to remedy its own errors. Under the statute, FERC retained substantial discretion that required it to resolve several contested points between the parties, and Congress did not purport to decide these issues or to direct a specific outcome. In addition, the statute *did* change the applicable law and did so *before* the agency had reached a decision about how to exercise its discretion. That Petitioner seeks to raise a contrived issue that is not actually presented on the record here is a sufficient reason to deny the Petition.

In addition, Petitioner's contention that the decision below conflicts with *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), is without merit, raises no split of authority, and does not warrant review. Petitioner has failed to identify any federal appellate decision—and Respondent is unaware of any—that extends *Klein* to *administrative* proceedings, much less to administrative *ratemaking* proceedings. Indeed, this Court has repeatedly indicated that *Klein* does not apply to such matters. And even if *Klein* did extend to such proceedings, there is no support for Petitioner's argument that Congress lacks the authority to regulate the exercise of *equitable discretion* in a pending administrative proceeding, especially where (as here) Congress acts *before* the agency exercises that discretion.

Petitioner's passing suggestion that the statute at issue here lacks a rational basis, Pet. 17, raises a meritless and factbound issue that is plainly uncertworthy. TAPS is a unique element of our Nation's overall energy supply system, and Congress could appropriately be concerned about the possible consequences flowing from the absence of fixed temporal limitations on FERC's ability to impose retroactive TAPS rates on shippers and refiners. Indeed, this Court has upheld statutes with a comparably narrow sweep affecting at most a handful of pending actions. *See, e.g., Robertson v. Seattle Audobon Soc'y*, 503 U.S. 429 (1992). Moreover, as set forth below, Petitioner's entire premise that the statute at issue unfairly imposes a different standard for this one case rests on a debatable (and, in Respondent's view, erroneous) construction of the statute as a whole—a contested legal issue that is currently the subject of a separate and unrelated pending FERC proceeding.

I. Petitioner's Novel Claim That Congress May Not Act to Narrow an Agency's Equitable Discretion in a Non-Final Administrative Ratemaking Proceeding Does Not Warrant Review

Petitioner's request to address the scope of *Klein* should be rejected because (1) this case does not present the broader issue Petitioner seeks to frame; (2) the decision below does not conflict with *Klein* or any other decision of this Court; and (3) the decision likewise does not conflict with that of any other court of appeals.

A. The Particular Question on Which Certiorari Is Sought Is Not Presented by the Facts of This Case

Petitioner asks this Court to review the question whether it is unconstitutional for Congress, without "amend[ing] applicable law," to "*direct*[] results" in a "single pending adjudication under old law." Pet. 14; *see also id.* at i (Congress cannot "*dicat*[*e*]" the remedy "in a single pending adjudication"); *id.* at 10 (Congress does not have a "blanket license to *dictate* the retrospective monetary relief available to private parties in a single case"); *id.* at 11-12 (Congress may not "pass[] laws that *dictate* the results in pending cases") (all emphases added). This question, however, is simply not presented here, because none of the predicates for the application of this supposed rule are present on the facts of this case.

1. Contrary to what Petitioner repeatedly suggests, section 4412 did *not* "direct" or "dictate" a particular result in the FERC proceeding at issue. In contrast to the extreme hypotheticals cited in the Petition, in

which Congress directs the entry of a judgment in a common-law cause of action for a specified amount, *see id.* at 20, Congress here simply imposed a temporal limit on the *range* of FERC's equitable discretion to impose retroactive rate changes in an administrative ratemaking proceeding.

At the time Congress enacted section 4412, the various Respondents were asserting a variety of different arguments before FERC concerning what Quality Bank rates should be and whether and to what extent any rates should be retroactive. These latter arguments included the following: that there should be no retroactivity at all, *see* Br. on Exceptions of the Eight Parties Before FERC at 93-158 (Nov. 16, 2004); that retroactivity should be limited to a later date (such as August 29, 2000, the date of the Eight Parties' settlement), *id.* at 170; and that there should be no retroactive award of interest, *id.* at 170 n.133. Petitioner's position, by contrast, was that there should be full retroactivity, with interest, all the way back to 1993. Pet. App. 4a. And after section 4412 was enacted, Respondents continued to press similar arguments that there should be no retroactivity at all, *id.* at 75a-77a, 174a-183a; that retroactivity should be limited to a later date (such as January 1, 2004), *id.* at 79a; and that there should be no retroactive interest, *id.* at 77a-79a, 183a. Congress's enactment of section 4412 did *not* determine which of these positions was correct, under old law. Instead, Congress simply imposed an outer limit on the extent to which FERC could exercise its equitable discretion to impose retroactive rate changes. It remained for FERC to decide, within those limits, how to exercise its discretion, and it did so: FERC ultimately decided to reject, on the merits, Respondents' various equita-

ble arguments for no retroactivity at all, for no retroactivity earlier than 2004, and for no retroactive interest. *Id.* at 79a-88a, 183a-192a.

Notably, FERC's retroactivity decision relied, in part, on the enactment of section 4412 in deciding to *reject* some of Respondents' equitable arguments. Pet. App. 81a (in light of Congress's prohibition on retroactivity earlier than February 1, 2000, "the validity of [certain Respondents'] equitable argument *has been undermined*") (emphasis added). Thus, to the extent that some Respondents argued that retroactivity was inequitable because they would have conducted their refining operations and sales activities differently if they had known that changes would be retroactive, FERC concluded that *these equities were no longer present in 2000*, which was *after* the D.C. Circuit had already held, in 1999, that retroactivity could be required. *Id.* (concluding that, after 1999, refiners "were on notice that they should modify their operations" and "after 1999, refiners could have protected themselves contractually"). This ruling only underscores that FERC retained substantial discretion to evaluate the equities as it saw fit.

Because section 4412 merely imposed an outer limit on the exercise of FERC's equitable discretion, while leaving to the agency the task of evaluating, within those limits, the numerous competing equitable arguments concerning retroactivity, there is simply no sense in which Congress can be said to have "dictated" or "directed" a specific outcome.[4]

---

[4] Indeed, the materials submitted by Petitioner confirm that Congress deliberately refrained from attempting to direct a specific outcome to the pending FERC proceedings. Pet. App. 206a (Letter of Senator Murkowski to President of Petitioner Exxon

2. For similar reasons, Petitioner is simply wrong in stating that section 4412 does not "amend applicable law." Pet. 14. Prior to the enactment of the statute, FERC possessed discretion to determine whether to apply a rate retroactively to correct agency error, and this exercise of discretion was not subject to any explicit temporal limit. *See Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999) ("We agree that FERC does have a measure of discretion in determining when and if a rate should apply retroactively."). Congress thought the lack of any such express limitation to be excessive here, and it therefore imposed such limits in section 4412. That is a change in the applicable law, not a direction to reach a particular result under old law. *See Robertson*, 503 U.S. at 438 (statute "compelled changes in law, not findings or results under old law" where, *inter alia*, there was "nothing in [the statute] that purported to direct any particular findings of fact or applications of law, old or new, to fact").

Petitioner's suggestion that a statute cannot be said to amend applicable law unless it effects an amendment of *generally* applicable law, *see* Pet. 13, is flatly contradicted by *Robertson*. There, the Court expressly found that the statute at issue "*did* amend applicable law" even though it assertedly "swept no more broadly, or little more broadly, than the range of applications at issue in the pending cases." 503 U.S. at 441 (emphasis in original); *see also id.* at 433

Mobil) ("[W]hile Congress could have imposed a final resolution in this case, we deliberately chose not to, allowing FERC to review the findings of its Administrative Law Judge and give all parties a fair opportunity to appeal FERC's decision from that review.").

& n.1 (noting that the statute only applied to timber sales from specified areas in Oregon and Washington that were then the subject of pending litigation).

3. Petitioner's characterization of this case as a "pending adjudication" is incorrect in two major respects. First, unlike *all* of the cases on which Petitioner relies, this case does not involve Congress's application of new law to a pending *judicial* proceeding. *See post*, 22-24. Although Petitioner contends that Congress's enactment of section 4412 represents an unconstitutional legislative "exercise of a core *judicial* function," Pet. 10 (emphasis added), no such question is presented here. Rather than presenting an opportunity to examine longstanding questions concerning "congressional power to have any individual *judicial* case among private parties decided as Congress wishes," *id.* at 18 (emphasis added), this case presents an entirely *novel* question concerning Congress's power over pending *administrative* proceedings. Second, even assuming *arguendo* that some administrative proceedings could be considered "adjudications" in a sense relevant here, a *ratemaking* proceeding is surely the poorest possible candidate for such a rule. As this Court has held, "[r]atemaking is an essentially legislative act," not an adjudicative one. *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 371 (1989).

* * *

For all of these reasons, the factual context of this case does not properly present the particular question on which Petitioner seeks this Court's review. This factor alone is sufficient to warrant denial of the Petition.

B. There Is No Conflict With *Klein* or Any Decision of This Court

In any event, Petitioner is wrong in contending that this case conflicts with *Klein*. Petitioner can point to no decision of this Court even suggesting that *Klein* applies to *administrative* proceedings, much less to administrative *ratemaking* proceedings. Nor does any case from this Court support Petitioner's apparent position that Congress lacks the authority to regulate the exercise of equitable discretion in a pending administrative proceeding, even where (as here) Congress acts *before* there is final agency action purporting to exercise that discretion.

1. In *Klein*, Treasury agents seized, as abandoned property, a large amount of cotton owned by a Confederate sympathizer named V.F. Wilson. 80 U.S. at 132. However, the statute under which the cotton had been seized and sold allowed owners to file a claim in the Court of Claims upon satisfactory proof that the claimant owned the property and that "he has never given any aid or comfort to the present rebellion.'" *Id.* at 131 (citation omitted). After Wilson died, the administrator of his estate (Klein) filed a claim under the statute, showing that Wilson had owned the cotton and seeking compensation for its seizure. As proof of Wilson's loyalty, Klein relied upon Wilson's receipt of a Presidential pardon. *Id.* at 132. Specifically, President Lincoln had issued a proclamation in December 1863 granting a full pardon "with restoration of all rights of property" to anyone who would take a "prescribed oath of allegiance" and "keep and maintain said oath inviolate." *Id.* at 131-32. Wilson had taken the required oath in 1864 and "kept the same inviolate" until his death in 1865.

Id. at 132. In 1869, the Court of Claims ruled in Klein's favor and awarded him $125,300 for the seized cotton. The Government appealed the judgment to the Supreme Court. *Id.*

While the appeal was pending, the Supreme Court held in *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1870), that the receipt of such a Presidential pardon established that the claimant "was as innocent in law as though he had never participated" in the rebellion, and that the statutory loyalty requirement for return of seized property was thereby satisfied. *Klein*, 80 U.S. at 133. Congress responded by passing a statute that provided, *inter alia*, that in any case in which the return of seized property was sought based on the claimant's receipt of a pardon that "'recite[d] in substance that such person took part in the late rebellion,'" then the pardon should be taken as "conclusive evidence" of the claimant's disloyalty and the suit was to be dismissed. *Id.* at 134 (citation omitted). Invoking this statute, the Government filed a motion to remand the case to the Court of Claims with instructions to dismiss Klein's suit. *Id.* at 130.

This Court held the statute unconstitutional, denied the Government's motion to remand, and instead affirmed the judgment in Klein's favor. The Court concluded that the clear purpose of the statute was "to deny to pardons granted by the President the effect which this court had adjudged them to have." 80 U.S. at 145. As such, the Court held that the statute suffered from two constitutional defects. First, the statute "prescribe[d] a rule for the decision of a cause in a particular way": if, based on *Padelford*'s construction of the effects of the pardon, the Court

found "that the judgment must be affirmed," the statute decreed that in that circumstance the Court was instead "directed to dismiss the appeal." *Id.* at 146. Upholding Congress's attempt to "prescribe rules of decision to the Judicial Department" in "cases pending before it," the Court reasoned, would "allow[] one party to the controversy to decide it in its own favor." *Id.* Second, the Court held that the statute was "also liable to just exception as impairing the effect of a pardon and thus infringing the constitutional power of the Executive." *Id.* at 147.

2. Neither of the two constitutional defects found in *Klein* is present in this case. This case, of course, does not involve any congressional attempt to infringe upon the Executive's pardon power. Nor does this case involve an attempt to "prescribe rules of decision *to the Judicial Department*," such that the *courts* are required to make a finding on a specific factual issue (in *Klein*, Wilson's loyalty) that is contrary to what is required, under the Court's precedents, on the record of the case. *Klein*, 80 U.S. at 146 (emphasis added). Here, Congress acted to limit the equitable discretion of an *administrative agency* in a ratemaking proceeding *before* that discretion was finally exercised; it did not, as in *Klein*, purport to direct a court to make specific findings or to enter a specific judgment that is contrary to the one an Article III court believed to be required by law.[5]

---

[5] *Klein* involved an effort by Congress to direct *this Court*—which is, of course, an Article III Court—to enter a specific judgment that was contrary to the one the Court believed to be required by law. *Klein* also expressly characterized the Court of Claims as "one of those inferior courts which Congress authorizes" under Article III. 80 U.S. at 145. This Court subsequently rejected that characterization of the Court of Claims in *Williams*

As FERC correctly noted in its brief in the D.C. Circuit, Petitioner has "cited no case, and we know of none, in which *Klein* has been held to limit Congress's powers vis-à-vis administrative agencies." Ct. of App. Br. of FERC and U.S. at 75-76. Because there is no decision of this Court that even remotely suggests that *Klein* applies to administrative agencies, there is no conflict with the decisions of this Court. Indeed, what authority there is suggests exactly the opposite. The Court has long held that Congress's power to affect "administrative orders" is significantly greater than its power to "affect[] judicial judgments," *Paramino Co. v. Marshall*, 309 U.S. 370, 381 n.25 (1940), and the Court has likewise held that the constitutional limits on legislative reopening of *federal court* judgments do not apply to "administrative agencies." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 232 (1995). And in *Glidden*, a plurality of the Court dismissed out of hand the notion that *Klein* would apply outside the context of *judicial* decisionmaking. *Glidden*, 370 U.S. at 568 (plurality) ("Surely no such concern would have been manifested [in *Klein*] if it had not been thought that the Court of Claims was invested with judicial power.").

Moreover, even assuming *arguendo* that *Klein* could extend to *some* administrative proceedings,

---

v. United States, 289 U.S. 553, 568, 580-81 (1933), although *Williams* itself was abrogated 30 years later. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 552-58, 562-84 (1962) (plurality) (rejecting *Williams* as wrongly decided); *id.* at 586-87 (Clark, J. concurring in judgment) (*Williams* superseded by subsequent statutory changes confirming that the Court of Claims was an Article III court). (The Court of Claims no longer exists, and its successor, the Court of Federal Claims, is expressly declared to be an Article I court. 28 U.S.C. § 171(a).)

there is no decision of this Court that supports the view that it would apply to *this* sort of proceeding. As noted above, *ante*, p.16, this Court has held that "ratemaking is an essentially *legislative* act," not a judicial one. *New Orleans Pub. Serv.*, 491 U.S. at 371 (emphasis added); *see also Colorado Interstate Gas Co. v. Federal Power Comm'n*, 324 U.S. 581, 589 (1945) ("Rate-making is essentially a legislative function," because Congress had not provided a "formula" that required the agency to adopt one particular method). In addition, unlike *Klein*, this case does not involve a *judgment* recognizing and enforcing a party's statutory entitlement to a sum-certain. On the contrary, at the time Congress acted, there was no final agency action at all—the matter was still under review by FERC, which remained free to accept or reject the ALJ's Initial Decision as it saw fit. *See* 5 U.S.C. § 557(b) ("on ... review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule"). And the underlying non-final decision before FERC involved, not the recognition and enforcement of specific and unambiguously defined property rights, but rather the exercise of *equitable discretion*. *See Exxon Co.*, 182 F.3d at 49.

In short, there is no authority from this Court (or elsewhere, *see post*, pp. 22-24) that would support Petitioner's view that Congress lacks the authority to impose any limitations on an administrative agency's yet-to-be-finally-exercised equitable discretion in a rate-setting proceeding.

C. There Is No Conflict Among the Lower Courts

The Petition likewise presents no conflict among the circuits. As noted earlier, Petitioner cannot point to a single case in the lower courts that purports to apply *Klein* to an administrative proceeding. *Ante*, p.20. Each and every one of the cases cited in the Petition as supposedly creating a split involves a *judicial* proceeding, not an administrative rate-making. Moreover, none of the federal appellate cases cited by the Petition even finds a *Klein* violation to be present. Petitioner thus cannot point to *any* case in which a *Klein* violation has been found by another circuit court on even remotely similar facts. The lack of a split is plain, and the Petition should be denied.

1. Petitioner's effort to conjure a conflict among the circuits fails at the outset, because Petitioner completely ignores the critical, threshold issue of whether *Klein* applies in the administrative agency context at all. On that issue, the caselaw across the circuits is uniform: no court has ever extended *Klein* to the administrative context.

The cases Petitioner cites in support of its argument that the lower courts are divided over "*Klein*'s ultimate import" only serve to confirm that *Klein's* application is limited to the judicial branch. In *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997), the Seventh Circuit considered and rejected a contention that the restrictive standards for granting federal habeas relief in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) unconstitutionally infringed upon the "interpretive power of the

courts." *Id.* at 182 (emphasis added). In fact, most of the cases upon which Petitioner relies likewise address whether AEDPA usurps the authority of the *federal courts*. *See Crater v. Galaza*, 491 F.3d 1119, 1128 (9th Cir. 2007) (cited at Pet. 20) (no *Klein* issue because AEDPA "does not restrict the *federal courts'* power to interpret the law, but only sets standards for what state court errors of law require federal habeas relief") (emphasis added), *cert. denied*, 128 S. Ct. 2961 (2008); *Green v. French*, 143 F.3d 865, 874-75 (4th Cir. 1998) (cited at Pet. 20) (AEDPA "does not limit any inferior *federal court's* independent interpretive authority to determine the meaning of federal law in any *Article III* case or controversy") (emphases added); *Evans* v. *Thompson*, 518 F.3d 1, 11 (1st Cir. 2008) (cited at Pet. 21, 22) (noting that in *Klein*, "Congress had 'prescribed' a 'rule of decision,' thereby *encroaching on Article III*") (emphasis added), *cert. denied*, 129 S. Ct. 255 (2008).

The remaining cases cited by Petitioner likewise reinforce the view that *Klein*'s application is limited to the judiciary. *See Shawnee Tribe* v. *United States*, 423 F.3d 1204, 1217-18 (10th Cir. 2005) (cited at Pet. 20) (citing *Klein* and noting that the "principle of separation of powers does place some limits on the ability of Congress to dictate the work of the *Article III courts*") (emphasis added); *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 430 (1995) (cited at Pet. 21) (under *Klein* Congress lacks authority to "instruct[] a *court* automatically to enter a judgment pursuant to a decision the court has no authority to evaluate") (emphasis added), *cert. denied*, 522 U.S. 931 (1997); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 395 (2d Cir. 2008) (cited at Pet. 22) (under *Klein* "*Article III* forbids legislatures from

'prescrib[ing] rules of decision to the Judicial Department of the government in cases pending before it'") (emphasis added) (citation omitted); *District of Columbia* v. *Beretta U.S.A. Corp.*, 940 A.2d 163, 172-73 & n.7 (D.C. 2008) (cited at Pet. 22) (applying *Klein* to judicial proceeding and finding statute constitutional; declining to answer whether *Klein* extends to non-Article III "independent judicial bodies, including the District of Columbia courts").[6]

2. Petitioner nonetheless suggests that there is a split of authority in light of the court of appeals' reliance here on *National Coalition to Save Our Mall v. Norton*, 269 F.3d 1092 (D.C. Cir. 2001), *cert. denied*, 537 U.S. 813 (2002). Because *National Coalition* rejected a *Klein* claim in the *judicial* context, Petitioner contends that the D.C. Circuit's reliance on that precedent here means that the decision below must somehow be understood as "announc[ing] a rule of unprecedented sweep that applies not only to agency adjudications, but also to any adjudication in court." Pet. 16. For multiple reasons, this argument fails.

---

[6] Two of the opinions Petitioner cites are not even opinions for the court, but separate opinions respecting rehearing en banc. However, they too confirm that *Klein* applies only to judicial proceedings. *Davis v. Straub*, 445 F.3d 908, 911 (6th Cir. 2006) (cited at Pet. 22) (Martin, J., joined by Daughtrey, Moore, Cole, and Clay, JJ., dissenting from denial of rehearing *en banc*) (AEDPA relegates "*[f]ederal judges*" to "spectators with 'no adjudicatory function to perform'") (emphasis added), *cert. denied*, 127 S. Ct. 929 (2008); *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270, 1274 (11th Cir. 2005) (cited at Pet. 22) (Birch, J. concurring in denial of rehearing en banc) (Congress may not "require[] federal courts to exercise *their Article III power 'in a manner repugnant to the text, structure, and traditions of Article III'*") (emphasis added) (citation omitted).

National Coalition held that *Klein* did not bar Congress from prohibiting judicial review of challenges to the decision where to locate the World War II Memorial, even though the effect of the statute was to require dismissal of a pending lawsuit challenging the location decision. 269 F.3d at 1097. The court held that the statute presented no *Klein* problem because, *inter alia*, the statute "amends the applicable substantive law" in a manner that was no less narrow than the statute upheld in *Robertson*. *Id.* Notably, Petitioner does *not* challenge the result or reasoning in *National Coalition*, and instead affirmatively *concedes* that that decision "is perfectly reconcilable with the rule of *Klein*." Pet. 15. Rather, Petitioner only challenges the application of *National Coalition* in the specific context of this case. Pet. 19 (challenging the court of appeals decision "extending *National Coalition*" in this case). Petitioner's factbound challenge to the court of appeals' application of the concededly correct decision in *National Coalition* is not certworthy.

Moreover, Petitioner is wrong in contending that the unpublished decision below will have significant implications for contexts *other* than the one presented here. *This* case presents an effort to raise a *Klein* issue in the context of administrative ratemaking, and that is what this Court would be reviewing if it granted certiorari here. Thus, even if *National Coalition* were in conflict with other circuit decisions in construing *Klein* in the *judicial* context—and it is not—this case simply does not present an appropriate vehicle for resolving any such issue.

Apart from these problems, there is nothing about the D.C. Circuit's application of *National Coalition*

here that conflicts with a decision of any other circuit. In the proceedings below, the Government properly relied upon, *inter alia*, *National Coalition*'s holding that, under *Robertson*, a statute that amends the applicable law may be applied to a pending proceeding even if it sweeps very narrowly and addresses only a specific problem. Ct. of App. Br. of FERC and U.S. at 83-84; *see also National Coalition*, 269 F.3d at 1097.[7] The court of appeals apparently agreed with that argument, because it summarily rejected Petitioner's separation of powers argument as contrary to *National Coalition*. Pet. App. 4a. As explained earlier, the statute in this case *does* amend the applicable law, and the decision here therefore does not extend *National Coalition* in a way that conflicts with a decision of another court of appeals. Petitioner's claimed split is illusory for the further reason that the grab bag of *Klein* cases on which Petitioner relies (most of which arise in the AEDPA context) does not include a single case in which a court *found* a *Klein* violation to have occurred. *Ante*, pp. 22-24. To the extent that Petitioner (wrongly) contends that there are differences in the particular verbal formulations used by different courts in analyzing the meaning of *Klein*, Petitioner has simply failed to show that any such differences have any real-world significance and have led to conflicting results.

---

[7] The Government notably also relied on the fact that *Klein* has never been applied in the administrative context. Ct. of App. Br. of FERC and U.S. at 75-80.

II. Petitioner's Rational-Basis Challenge to the Statute Presents No Split of Authority and Is Insubstantial

In a single paragraph, Petitioner briefly contends that section 4412 lacks a rational basis. *See* Pet. 17. Petitioner conspicuously does not contend that there is a split on this issue, but instead makes a wholly factbound argument that Congress lacked a rational basis for applying a different rule to pending TAPS ratemaking proceedings than to proceedings filed after section 4412's effective date. This question is not remotely certworthy. Congress had an ample rational basis for treating the two categories differently. Moreover, Petitioner exaggerates the significance of Congress's distinction between the two situations by mischaracterizing the scope of the rule that applies to after-filed cases (a matter that is currently the subject of dispute before FERC in other proceedings).

1. Rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Laws subject to rational basis review "must be upheld ... if there is any reasonably conceivable state of facts that could provide a rational basis" for them. *Id.* As the D.C. Circuit correctly stated below, this standard "is plainly satisfied" here given that "Congress could easily have concluded that limiting the retroactivity of refunds would help provide certainty to parties affected by FERC's decision." Pet. App. 4a; *cf. Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 731 (1984) (refusing to second-guess balance of benefits and harms struck by Congress in selecting a statute's effective date, noting "the enactment of retroactive statutes confined to

short and limited periods required by the practicalities of producing national legislation ... is a customary congressional practice"); *Johnson v. Arizona*, 462 F.2d 1352, 1354 (9th Cir. 1972) (changes in the law may be applied "retroactively" or "limitedly retroactively" so long as the application has "some rational basis, announced with reasonable precision").

In enacting section 4412, Congress rationally concluded that the imposition of retroactive monetary awards all the way back to 1993 would disturb and dislocate the financial interests and activities of refiners and shippers, particularly where (as here) the administrative proceedings have lasted nearly twenty years because of FERC's repeated errors. *See* 151 Cong. Rec. S3752 (daily ed. Apr. 15, 2005) (statement of Sen. Murkowski) (noting with respect to proposed act that refineries "have no way to make rational business decisions when the value of their products can be determined retroactively long after they can protect themselves for perceived mistakes in FERC-approved valuation methodologies"). Further, Congress legitimately could have concluded that such protections were necessary given the unique nature of TAPS. *See Plaut*, 514 U.S. at 239 n.9 ("Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid ....").

2. Moreover, Petitioner's argument rests on a mistaken premise: Petitioner misapprehends the import of Congress's distinction in section 4412 between pending proceedings and proceedings commenced after the statute's enactment date.

Specifically, Petitioner mischaracterizes the scope of subsection 4412(b)(2), which provides that "[i]n a proceeding commenced after the date of enactment of

this Act, the Commission may not order retroactive changes in TAPS quality bank adjustments for any period that exceeds the 15-month period immediately preceding the earliest date of the first order of the Federal Energy Regulatory Commission *imposing quality bank adjustments* in the proceeding." Pub. L. No. 109-59, § 4412(b)(2), 119 Stat. at 1778-79 (emphasis added). This 15-month period exactly coincides with the 15-month limitation on how long FERC can take to issue a final order on a claim related to a Quality Bank adjustment. *See id.*, § 4412(c)(2). Reading the sections *in pari materia* and according to their plain terms, it is clear that, under section 4412(b), retroactive changes are limited to no more than a "15-month period" and that the period is calculated with reference to the "first order" that imposes such "retroactive changes" in "TAPS quality bank adjustments" (a term defined to mean "*monetary* adjustments paid" in connection with the Quality Bank, *id.*, § 4412(a) (emphasis added)).

Petitioner, however, erroneously argues that in "every TAPS Quality Bank proceeding *other than this one*," section 4412(b)(2) "authorize[s] the Commission to order retroactive Quality Bank adjustments back to the original claim, *with no limitation on refunds if (as here) proceedings are extended by repeated judicial vacatur of the Commission's orders*." Pet. 8 (emphases added). Petitioner thus contends that "[w]ere it applied to this case," the "section 4412(b)(2) rule" would have resulted in refunds "ordered back to September 1992 (if otherwise permitted by law)," because the "Commission's first order adjusting valuations was issued on November 30, 1993." Pet. 14. Petitioner therefore argues that, if section 4412(b)(2) were applicable here, it would have allowed FERC,

when the agency *first* imposed retroactive changes in quality bank adjustments in October 2005, to impose more than *twelve years* of retroactive payments. This argument ignores the statutory text, which limits the term of possible retroactivity to a "15-month period" and fixes the start of that period as the date such retroactive changes are first ordered. Pub. L. No. 109-59, § 4412(b)(2). Indeed, 15 months prior to October 2005 would produce a retroactivity period that is *less* favorable than the one Petitioner obtained below under section 4412(b)(1).

Notably, the meaning of subsection 4412(b)(2) is currently the subject of a separate proceeding currently pending before FERC. *See* Protest of Flint Hills Resources Alaska LLC to Compliance Filing of the TAPS Carriers, Docket No. OR06-10-000 (FERC), dated April 17, 2008, at 2-5. That Petitioner's equal protection and due process arguments rest on a debatable and unsettled legal premise provides yet another reason to deny review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

November 2008

DANIEL P. COLLINS
Counsel of Record
JONATHAN H. BLAVIN
MUNGER, TOLLES & OLSON LLP

RICHARD A. CURTIN
PETRO STAR INC.

Counsel for Respondent
Petro Star Inc.